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**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 8  
PTH

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Matthew J. Davenport

Serial No. 75/816,459

Patrick M. Dwyer for applicant.

Mitchell Front, Trademark Examining Attorney, Law Office  
111 (Craig Taylor, Managing Attorney).

Before Hairston, Chapman and Drost, Administrative  
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Matthew J. Davenport, on October 6, 1999, filed an application to register the mark RAIN ENTERTAINMENT for services which were identified as "entertainment services, namely, recording, producing, publishing, compilation albums, manufacturing, marketing, promotion, publicity, artist development, representation, management, booking, touring and conventions" in Class 41.<sup>1</sup>

<sup>1</sup> Application Serial No. 75/816,459 alleging a date of first use of November 7, 1997 and a date of first use in commerce of March 24, 1998.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark, when used in connection with the identified services, so resembles the mark RAIN which is registered for "entertainment services in the nature of a musical band,"<sup>2</sup> as to be likely to cause confusion. Further, the Examining Attorney required applicant to amend the recitation of services so as "to indicate the nature of the services and the particular field" and advised applicant that the services as identified covered two classes. Finally, the Examining Attorney required applicant to disclaim the word ENTERTAINMENT apart from the mark as shown.

Applicant, in his response, argued against the Section 2(d) refusal. Further, applicant declined to enter the disclaimer. Applicant, however, amended his recitation of services (although the services remained in Class 41 only) to "entertainment services, namely audio recording and production, music publishing, and artist representation and management services for others."

The Examining Attorney, in a final Office action, maintained the Section 2(d) refusal; the requirement for an

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<sup>2</sup> Registration No. 1,572,476 issued December 19, 1989; renewed.

acceptable recitation of services, including the placement of the services in two classes<sup>3</sup>; and the requirement for a disclaimer of ENTERTAINMENT.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested.

We turn first to the requirement for an acceptable recitation of services. It is the Examining Attorney's position that the present recitation is indefinite and covers services in more than one class. In particular, the Examining Attorney argues that the wording "artist representation and management services for others" is not readily understandable and that more accurate language would specify how or in what capacity the applicant represents artists. Further, the Examining Attorney maintains that applicant's services are properly classified in Classes 35 and 41.

Applicant, in his brief, does not address the issue of whether the recitation of services is indefinite, and argues only that the Examining Attorney has cited no

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<sup>3</sup> In particular, the Examining Attorney suggested that applicant adopt the following recitation of services: "artist management services" in Class 35, and "entertainment services, namely audio recording and production, and music publishing services" in Class 41.

authority for his breakdown of applicant's services in two classes.

Contrary to applicant's contention, the Examining Attorney has cited appropriate authority in support of his position with respect to both the recitation of services and the classification of the services, namely, Section 1301.05 of the Trademark Manual of Examining Procedure and the Office classification system, respectively. We agree with the Examining Attorney's assessment that the recitation of services is indefinite and that the services fall in two classes. In view thereof, the Examining Attorney's requirement in this regard is appropriate.

With respect to the disclaimer requirement, it is the Examining Attorney's position that the word ENTERTAINMENT describes the nature of applicant's services, namely, that they are in the field of entertainment.

Applicant does not address the issue of whether the word ENTERTAINMENT is descriptive of applicant's services and, therefore, should be disclaimed. Rather, applicant argues that the Examining Attorney has requested the disclaimer only in an effort to support the Section 2(d) refusal.

In this case, we agree with the Examining Attorney that ENTERTAINMENT is descriptive of the nature of

applicant's services. Clearly, applicant's services are in the nature of entertainment services. As noted by the Examining Attorney, applicant itself has identified its services as entertainment services. In view thereof, the requirement for a disclaimer of ENTERTAINMENT is appropriate.

We turn then to the refusal to register under Section 2(d) of the Trademark Act. Our determination under Section 2(d) of the Trademark Act is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. Du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services.

Turning first to the marks, we find that applicant's mark RAIN ENTERTAINMENT and registrant's mark RAIN are substantially similar in sound, appearance and commercial impression. In comparing the marks, we recognize that the descriptive word "ENTERTAINMENT" in applicant's mark cannot be ignored. See Giant Food, Inc. v. National Food Service, Inc., 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1993). However, although we have resolved the issue of likelihood

of confusion by a consideration of the marks in their entirety, there is nothing improper in giving more weight, for rational reasons, to a particular feature of a mark. See *In re National Data Corp.*, 753 F. 2d 1056, 224 USPQ 749 (Fed. Cir. 1985). In this case, we have given more weight to the RAIN portion of applicant's mark because of the descriptive nature of the word "ENTERTAINMENT for entertainment services."<sup>4</sup> Further, it is often the first part of a mark that is most likely to be impressed upon the mind of a purchaser and to be remembered. See *Presto-Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988); and *Mine Safety Appliances Co. v. Management Science America, Inc.*, 212 USPQ 105, 108 (TTAB 1981).

This brings us to a consideration of the respective services. It is well settled that goods and/or services need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods and/or services are related in some manner or that the circumstances

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<sup>4</sup> We wish to make clear that the reason we have given more weight to the word RAIN in our analysis is because the word ENTERTAINMENT is descriptive of applicant's services, and not because the Examining Attorney required a disclaimer of the word. Of course, as we have indicated, it was entirely proper for the Examining Attorney to require a disclaimer of the word ENTERTAINMENT because it is descriptive of applicant's services.

surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used in connection therewith, to a mistaken belief that they originate from the same producer or that there is an association between the producers of the goods and/or services. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

In this case, we find that applicant's "entertainment services, namely audio recording and production, music publishing, and artist representation and management services for others," and registrant's "entertainment services in the nature of a musical band" are complementary, closely related services. The Examining Attorney submitted copies of twenty use-based third-party registrations to demonstrate the relationship between the involved services by showing that in each instance a single entity had adopted one mark for live performances by a musical band, on the one hand, and audio recording and production and/or publishing and distribution of recordings, on the other hand.

Third-party registrations are not evidence of commercial use of the marks shown therein, or that the

public is familiar with them. Nevertheless, third-party registrations which individually cover a number of different services and which are based on use in commerce have some probative value to the extent they serve to suggest that the listed services emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988).

Although applicant maintains that musical bands generally do not render such services as audio recording and production, music publishing and artist representation and management for others as does applicant, applicant offered no support for this argument.

Further in this regard, applicant argues that the third-party registrations relied on by the Examining Attorney are not probative of whether the involved services are related because such registrations do not specify, as does applicant's application, that the services are rendered "for others." This argument, however, is not well taken since it is implicit in the nature of services that they are offered for others.

We conclude, therefore, that purchasers familiar with registrant's RAIN musical band may, upon seeing applicant's mark RAIN ENTERTAINMENT on closely related services, assume



that applicant's services originate from the same source as registrant's services, or are somehow sponsored by or approved by registrant. In particular, purchasers may assume that RAIN ENTERTAINMENT is an entity associated with registrant engaged in audio recording and production, music publishing, and artist representation and management.

Applicant argues that purchasers of its services are sophisticated, and that therefore they would not be confused just because the involved marks share the word RAIN. This amounts to unsupported speculation. Without evidence to the contrary, it seems to us that purchasers of applicant's services would constitute a broad range of individuals, including both accomplished and novice musicians. Moreover, even if we had been provided with a basis for concluding that the purchasers of applicant's services are sophisticated, it does not necessarily follow that they would be particularly discriminating purchasers of music-related services.

Finally, even if we had doubt on the issue of likelihood of confusion, such doubt must be resolved in favor of the prior registrant and against the newcomer. See *In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes*, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

**Decision:** The refusal to register under Section 2(d) is affirmed; the requirement to amend the recitation of services, including placement of the services in two classes is affirmed; and the requirement to disclaim ENTERTAINMENT is affirmed.